TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 389.

THE KANSAS PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES C. CULP.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED MAY 27, 1872.

SUPREME COURT OF THE UNITED STATES.

No. 389.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the supreme court of the State of Kansas, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, between The Kansas Pacific Railway Company and Charles C. Culp, wherein was drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a
2 treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Kansas Pacific Railway Company, as by its complaint appears: We, being willing that error, if any have been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of April next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may
3 cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the said Supreme Court, the 25th day of Jan'y, A. D. 1872.

[SEAL.]

A. S. THOMAS,
Clerk of the Circuit Court of the United States for the District of Kansas.

Allowed by—

S. A. KINGMAN,
Chief Justice Supreme Court of Kansas.

(Indorsed:) 644. The Kansas Pacific Railway Co. vs. Charles C. Culp. Filed Jan'y 26, 1872. A. Hammatt, clerk sup. court.

4 To the Honorable Samuel A. Kingman, chief justice of the supreme court of the State of Kansas:

Your petitioner, the Kansas Pacific Railway Company, sheweth unto your honor, that, heretofore, to wit, at our present January term of the supreme court of the State of Kansas, by the judgment and consideration of said court, final judgment was entered therein in a suit pending in said court, wherein your petitioner was plaintiff in error and Charles C. Culp was defendant in error.

That in said suit there was drawn in question the right and power of

the State of Kansas to impose and asses taxes upon the lands granted by the United States to your petitioner by the act of Congress, being an act entitled "An act, etc.," approved July 1st, 1862, and the subsequent acts of Congress amendatory thereof, before said lands were listed and selected, and before the fees and costs were paid for such selection, and for patents by your petitioner; and that said decision was adverse to the right and exemption claimed by your petitioner, and that it so
5 appears of record; and further, that said decision was rendered by the highest court of the State in which such decision could be had; and your petitioner being desirous to present a writ of error to the Supreme Court of the United States to reverse said decision, prays your honor to allow the writ of error and affix your signature to the citation to the defendant for that purpose.

Know all men by these presents that *we*, J. P. Usher, are held and firmly bound unto Charles C. Culp, in the just and full sum of five hundred dollars, to be paid to Charles C. Culp, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this 26th day of January, 1872.

Whereas, lately, at the January term, A. D. 1872, of the supreme court of the State of Kansas, in a suit depending in said court
6 between The Kansas Pacific Railway Company and Charles C. Culp, judgment was rendered against the said Kansas Pacific Railway Company, having obtained and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Charles C. Culp, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of April next:

Now, the condition of the above obligation is such, that if the said Kansas Pacific Railway Company shall prosecute its said writ of error to effect, and answer all damages and costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

J. P. USHER.

Sealed and delivered in presence of, and approved by—
SAMUEL A. KINGMAN,
Ch. Justice.

The United States of America to Charles C. Culp, greeting:

7 You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the first Monday of April next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Kansas, wherein the Kansas Pacific Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error is mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel A. Kingman, chief justice of the supreme court of the State of Kansas, this the 26th day of January, in the year of our Lord one thousand eight hundred and seventy-two.

SAMUEL A. KINGMAN,
Ch. Justice.

Due service of the above citation is hereby admitted this Jan. 31st, 1872.

J. G. MOHLER,
Att'y of Record for the Def't in Error, in the Supreme Court of the State of Kansas.

8 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the supreme court of the State of Kansas, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, between The Kansas Pacific Railway Company and Charles C. Culp, wherein was drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a
9 treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the Kansas Pacific Railway Company, as by its complaint appears: We, being willing that error, if any have been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of April next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what
10 right and according to the laws and custom of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the said Supreme Court, the 25th day of January, A. D. 1872.

[L. S.] A. S. THOMAS,
Clerk of the Circuit Court of the United States, for the District of Kansas.

11 Pleas had in the supreme court of the State of Kansas, at its regular January session of said court, held in the supreme court rooms, in Topeka, Kansas, on and from the 2d day of January A. D. 1872. Present, at said court, Hon. S. A. Kingman, C. J.; Hon. D. M. Valentine, J.; Hon. D. J. Brewer, J.; A. Hammatt, esq., clerk.

Be it remembered that, heretofore, to wit, on the 7th day of January, A. D. 1871, The Kansas Pacific Railway Company filed, in said supreme court, their certain petition in error, and transcript and record of the proceedings of the eighth judicial district court, sitting within and for the county of Saline, in the State of Kansas, against Charles C. Culp, of which petition in error the following is a true copy:

THE STATE OF KANSAS, *Supreme Court:*

THE KANSAS PACIFIC RAILWAY COMPANY, plaintiff in error,
vs.
CHARLES C. CULP, DEFENDANT IN ERROR.

12 *Petition in error.*

The said plaintiff in error says that, on the 30th day of December, A. D. 1870, the said defendant in error recovered a judgment against the plaintiff in error by the consideration of the district court, sitting in and for Saline County, Kansas, by which the said district court dismissed the petition of the said plaintiff in error, and gave judgment against the plaintiff in error for the costs of the action, as will more fully appear from the transcript of the record and proceedings in said case herewith filed, reference being thereto had.

There is error in the judgment of the said court in this, to wit:

The court erred in finding the issues with the said defendant in error instead of for the plaintiff in error upon the agreed statements of facts.

2d. The court erred in giving judgment for the said defendant in error instead of for the said plaintiff in error.

13 Wherefore the plaintiff in error prays that the said judgment may be reversed, and that the court order that judgment be entered in the district court for the said plaintiff in error.

McCLURE & HUMPHREY,
For Plaintiff in Error.

(The same is endorsed:) Filed January 7th, A. D. 1871. A. Hammatt, clerk.

KANSAS PACIFIC RAILWAY COMPANY
vs.
CHARLES C. CULP.

In the district court of Saline County, Kansas. September term, 1870.

Be it remembered that, on the 30th day of December, 1870, this case came on for hearing upon the petition of the plaintiff, which is in the words and figures, as follows, to wit:

STATE OF KANSAS, *Saline County, ss:*

In the district court of Saline County, with McPherson County thereto attached for judicial purposes.

THE KANSAS PACIFIC RAILWAY COMPANY, plaintiff,
vs.
CHARLES C. CULP, DEFENDANT.

Petition.

14 The plaintiff says that plaintiff has the legal title to, and is in the peaceable possession of, the following real estate, situate in McPherson County aforesaid, and described as the northeast quarter of

section 31, in township 17, range 4 west, in McPherson County, State of Kansas; and the said plaintiff further says that the said Charles C. Culp sets up and claims an estate and interest in and to said premises adverse to the estate and interest of the said plaintiff, so as aforesaid averred. The said plaintiff, therefore, prays that the said Charles C. Culp may be compelled to show his title, and that it may be determined to be null and void, as against the title of said plaintiff.

E. W. DENNIS,
McCLURE & HUMPHREY,
For Plaintiff.

And the answer of the defendant, which is in words and figures, as follows, to wit:

CHARLES C. CULP, DEF'T,
ad's
THE KANSAS PACIFIC RAILWAY COMPANY, pl'ff.

15 Comes now Charles C. Culp, the said defendant, and, for answer to the petition heretofore in the above-entitled cause filed, admits that he has and claims a certain estate, title, and interest in and to the lands in said petition described, but he denies each and every other allegation in said petition contained, and each and every part thereof.

And for further answer to the said petition, this defendant avers that, heretofore, to wit, on the 1st day of March, A. D. 1869, the said plaintiff was the owner in law and in possession of the lands aforesaid, and that, on the date last aforesaid, the said lands were subject to taxation in the county of Saline, and State of Kansas aforesaid; and further, for that, afterwards, during the year aforesaid, the said lands was duly listed as the property of the Union Pacific Railway Company, eastern division, which said corporation was and is identical with the said plaintiff, one and the same, and thereafter was valued, as required by law, at the sum of four hundred and eighty dollars ($480.00) in money, a tabular statement of which valuation, among others,
16 was returned duly certified to the office of the county clerk of said Saline County, in item and in manner as required by law; and further, for that the various organizations authorized by law to levy taxes in said McPherson County, township, in Saline County and State of Kansas, duly levied their several taxes upon the said taxable property, and that the amounts of said levies were duly certified to the county clerk of said Saline County, in time and manner as prescribed by law; and that the said land described in said petition was, by the said county clerk, charged with the several taxes in sums as required by and in accordance with the various levies aforesaid and placed upon the tax-roll of said Saline County for the year 1869, according to law; all of which will more fully appear by reference to a certain tabular statement of said tax, charge, and transcript of said tax-roll for the year aforesaid, which is hereto attached and marked Exhibit "A," and made a part hereof. This defendant further avers that, thereafter, the said tax-roll, certified as required by law, was, by the said county
17 clerk, duly delivered to the treasurer of said county; and that thereupon the said treasurer gave due notice of the amounts and rates of the several levies aforesaid, respectively, and of all and every of the times and periods by him appointed for his attendance at the

various places in said county, as required and specified by law, for the purpose of receiving the same.

And further, that the said county-treasurer did so attend the various places aforesaid, at the times and in the manner in said notice mentioned and described, but that the said taxes, amounting in all to the sum of eleven dollars and fifty-two cents, ($11.52,) upon said parcel of land, though legally due and owing upon said premises, were not then paid and remained so as aforesaid, unsatisfied and unpaid, until the 10th day of January, A. D. 1870; after which a penalty of one dollar and sixteen cents, ($1.16,) as required by law, was added to said sum of taxes on said land, as appears by said Exhibit "A."

And further, for that, afterwards, the said lands were duly entered by the said county-treasurer in the delinquent tax-list for the year
18 aforesaid, to wit, A. D. 1869, and with others duly advertised for sale by the said county-treasurer, in accordance with law. This defendant further avers that, afterwards, to wit, on the 3d day of May, A. D. 1870, the said land was, by the said county-treasurer, duly offered for sale, with others, and was then and there bid off by the treasurer of said Saline County, for the said county, according to law, for the amount of the said taxes and penalty and accrued cost, amounting in all to the sum of twelve dollars and ninety-three cents, ($12.93,) as appears by said Exhibit "A;" and further, that, afterwards, to wit, on the 3d day of August, A. D. 1870, the said northeast quarter of section 31, in township seven S., of range four west, was, by the county clerk of said Saline County, duly sold and assigned to him this defendant, for the sum of fourteen dollars and fifty-four cents, being certificate numbered 266, of the tax-sales of the delinquent tax-sales of the year aforesaid; all of which will more fully appear by reference to the said tax-certificates of said purchase, a copy of which is hereto attached, marked Exhibit "B," and made a part of this answer, whereby he, this
19 defendant, became and now is the lawful owner of said premises.

EXHIBIT "A."

TREASURER'S OFFICE, SALINE COUNTY, KANSAS.

$ .00.] [No.

Salina, , 18 .

Received of , $\frac{00}{100}$ dollars, being the amount in full of all the taxes for the year 18 , on the following described real-estate and personal property:

Description of land.	Section.	Town.	Range.	Val.	Tax.	$ C'ts.
N. E. ¼	31	7	4	$480	State-tax	5 28
State, 11 mills					County-tax	4 80
County, 10 "					Township-tax	1 44
Township, 3 "					Penalty	1 16
					Advertising	25
						12 93

I hereby certify that the above is a correct transcript from the tax-roll of 1869.

S. AMRINE, *Treasurer.*
By C. E. TAMKEN, *Deputy.*

Treasurer Saline County.

Per *Deputy.*

EXHIBIT "B."

Certificate No. 266. [$14.54.

I, S. Amrine, county-treasurer, of Saline County, in the State of Kansas, do hereby certify, that the following described real-estate, to wit, N. E. ¼ section 31, township 7, range 4, McPherson County, K's, was, on the 3d day of May, 1870, sold by me, at public auction, at my office,
20 in Salina, to Saline County, for the sum of twelve $\frac{93}{100}$ dollars, being the full amount of tax and charges due upon said real estate for the year 1869. And I further certify, that Charles C. Culp has this day paid into the county-treasury of said county the sum of fourteen & $\frac{54}{100}$ dollars, being delinquent tax, int., & charges for 1869; and that the said Charles C. Culp, his heirs, or assigns, will, on the 3d day of May, A. D. 1873, be entitled to a deed therefor from Saline County, unless said real estate shall have been redeemed as provided by law.

Given under my hand at my office, in Salina, Saline County, State of Kansas, on this 3d day of August, A. D. 1870.

S. AMRINE, *County Treasurer.*
By C. E. TAMKEN, *Deputy.*

I, David Beebe, county clerk of said county, in consideration of the above-certified payment of fourteen & $\frac{54}{100}$ dollars, do hereby assign all the right, title, and interest of said Saline County to the above certificate to Charles C. Culp, and I hereby certify that this assignment has been duly entered on my duplicate book of tax-sales in my office.
21 Given under my hand and official seal, on this 3d day of August, A. D. 1870.

[L. S.] D. BEEBE, *County Clerk.*
Per C. CULP, *Depp.*

Wherefore this defendant prays that the nature and the claim of the parties in and to the said land may be respectively determined, and that the estate of the said defendant may be decreed to be superior to the estate of the said plaintiff; that the said defendants may be adjudged to be the lawful owner of said premises, and for such further and other relief as equity may demand.

G. G. LOWE,
County Att'y and Att'y for Def't.

And the reply thereto of the plaintiff is in the words and figures as follows, to wit:

KANSAS PACIFIC RAILWAY COMPANY, PLAINTIFF,
vs.
CHARLES C. CULP, DEFENDANT.

Reply.

The plaintiff denies each and every allegation contained in defendant's answer.

E. W. DENNIS, &
McCLURE & HUMPHREY,
For Plaintiff.

22 And the said parties agree to and do waive a trial by jury, and submit the issues to the court upon the following agreed statement of facts, to wit:

KANSAS PACIFIC RAILWAY COMPANY, PLAINTIFF,
vs.
CHARLES C. CULP, DEFENDANT.

Agreed statement of facts.

The said plaintiff, by McClure & Humphrey, its attorneys, and the said defendant, by J. G. Mohler, his attorney, agree that it is the fact in this case that the said plaintiff was, at the commencement of this suit, the owner and in the possession of the land described in the plaintiff's petition; that the said land was assessed for taxation in and for the year 1869, and county, State, and school taxes for that year were duly levied thereon; that the said taxes remaining unpaid, the said land was duly advertised and sold for the said taxes by the treasurer of Saline County, and, for want of other bidders, was by the said county-treasurer bid off at said sale for Saline County; that the tax-
23 certificate was afterwards, by the county-clerk of Saline County, duly assigned, for the taxes, costs, and interest thereon, to the def't, on the 3d day of August, 1870; that the various proceedings in relation to the assessment, tax, levy, sale, and assignment aforesaid were regular. It is further agreed to be the fact that the plaintiff derived title solely under and by virtue of the act of Congress, approved July 2d, 1864, entitled, "An act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean,'" &c., approved July 1st, 1862; that, at the time said land was assessed as aforesaid, the plaintiff company had completed the construction of the section of 40 miles of their road within which land lies, to the approval of the President of the United States; that the said plaintiff, at the time the said land was assessed for taxation as aforesaid, had not paid into the Treasury of the United States the cost of surveying, selecting, and conveying the said land; and that no patent therefor had been issued by the Government of the United States to the said plaintiff company; that the
24 said plaintiff had caused the said land to be valued and appraised; but that said land had not been selected and conveyed as provided in said act of Congress, nor the sum of one dollar per quarter section paid as provided; that said plaintiff has done all acts necessary to be done by it to obtain a patent for said land except as hereinbefore stated.

McCLURE & HUMPHREY,
Attys' for Pl'ff.
J. G. MOHLER, *Att'y for Def't.*

And the said case was argued by counsel. The court thereupon rendered the following judgment, to wit:

KANSAS PACIFIC RAILWAY CO., PLAINTIFF,
vs.
CHARLES C. CULP, DEFENDANT.

Judgment.

And now, to wit, December 30th, 1870, comes the said plaintiff company, by McClure & Humphrey, its attorneys, and also comes the said defendant, by J. G. Mohler, his attorney, and the issues herein
25 are submitted to the court on an agreed statement of facts; and thereupon the court do find that the said plaintiff was, at the

commencement of this action, the owner and in possession of the land and premises described in the said plaintiff's petition; and that the said plaintiff was the legal owner of the same in the year 1869, and at the time the said lands *was* assessed for taxation and the taxes were thereon levied for that year, in the said county of Saline.

That the said land was legally assessed for taxation for 1869, under the laws of Kansas, and the taxes for that year duly levied on the same, and that the said taxes became a legal charge and lien on the said land; that the said land was legally sold for the non-payment of the said taxes, and the certificate of sale for the same duly assigned to the defendant; that the said taxes and subsequent charges upon the said land have not been paid, and that the said *land have not been paid, and that the said* tax-certificate is and was at the commencement of this action in full force and effect.

It is therefore considered and ordered by the court that the petition of the said plaintiff be dismissed, and that the defendant
26 recover of the plaintiff his costs herein expended, taxed at $; and hereof let execution issue.

To all of which findings, except such as are expressly admitted in the agreed statement of facts and rulings and judgment of the court, the said plaintiff excepts.

And afterwards, on said day, the said plaintiff moved the court for a new trial in said case; which motion is in the words and figures as follows, to wit:

KANSAS PACIFIC RAILWAY COMPANY, PLAINTIFF,
vs.
CHARLES C. CULP, DEFENDANT.

Motion for new trial.

And December 30th, 1870, comes the said plaintiff company, by McClure and Humphrey, its attorneys, and moves the court here for a new trial in this case on the grounds—

1st. That the findings of the court are contrary to the agreed statement of facts upon which said case was submitted.
27 2d. The judgment of said court is not sustained by sufficient evidence, and is contrary to law.

McCLURE & HUMPHREY,
Attorneys for Plaintiff.

Which motion being argued by counsel and considered by the court, is overruled.

The order of the court overruling said motion is in words and figures as follows, to wit:

KANSAS PACIFIC RAILWAY COMPANY
vs.
CHARLES C. CULP.

Order overruling motion for a new trial.

And now, December 30th, 1870, comes the said plaintiff company, by McClure & Humphrey, its attorneys, and also comes the said defendant, by J. G. Mohler, his attorney, and the said motion of the plaintiff for a

new trial in this case, upon the ground in said motion stated, came on for a hearing, and is argued by counsel, and being considered by the court, it is ordered by the court that the said motion for a new trial be, and the same is, overruled; to which ruling and order of the court the plaintiff excepts.

To which ruling of the court the said plaintiff then and there
28 excepted, and now prays that this his bill of exceptions may be signed, sealed, and made a part of the record in the case; which is accordingly done.

Witness my hand and seal this 30th day of December, A. D. 1870.

WM H. CANFIELD, *Judge.*

THE STATE OF KANSAS,
County of Saline, ss:

I, A. S. Norton, clerk of the district court in and for said county and State, do hereby certify that the foregoing is a true and correct transcript of all files and records of proceedings had in the above-entitled cause, as appears of record in my office.

In witness whereof I have hereunto set my hand, and affixed my official seal, at Salina, Kansas, this 3d day of January, A. D. 1871.

[L. S.] A. S. NORTON, *Clerk.*

(The same is endorsed:) Filed Jan'y 7th, 1871. A. Hammatt, clerk.

29 And, thereupon, upon the filing of said petition in error and transcript of the proceedings in the court below, to wit, January 7th, A. D. 1871, there was issued out of said supreme court a summons for said defendant, which is in the words and figures as follows, to wit:

SUPREME COURT,
The State of Kansas, ss:

To the sheriff of Saline County, greeting:

You are hereby commanded to notify Charles C. Culp, that the Kansas Pacific Railroad Comp. did, on the 7th day of January, A. D. 1871, file in the clerk's office of the supreme court of Kansas, his petition in error and transcript of record, the object of which is to obtain the reversal of a certain judgment, rendered against them by the district court for the 8th judicial district, State of Kansas, sitting within and for the county of Saline, at the September term thereof, A. D. 1870, in an action pending before said court, wherein the said Kansas Pacific Railroad Company were plaintiffs, and the said Charles C. Culp
30 was defendant.

You will make due return of this summons in error on or before the 18th day of January, A. D. 1871.

Witness my hand and the seal of said court affixed at my office, in the city of Topeka, this 7th day of January, A. D. 1871.

[L S.] A. HAMMATT, *Clerk.*

The same was returned July 13, 1871, endorsed as follows:

SALINE COUNTY, *Jan'y* 11, '71.

Service of the within summons acknowledged.

J. G. MOHLER,
Att'y for Culp.

The same was still further endorsed: Supreme court. The State of Kansas. K. P. R. R. Co. versus Cha's C. Culp. Summons in error. Issue Jan'y 7th. 1871. Returnable Jan. 18th, 1871. Filed Jan.
31 13th, 1871. A. Hammatt, clerk. Dennis, McClure & Humphrey, att'y for pl'ff.

And thereupon, afterwards, to wit, at the January term, of said court, 1871, among others, the following was had, to wit:

WEDNESDAY, *March 1st*, 1871.

Court met pursuant to adjournment. Present as before.

KANSAS PACIFIC RAILWAY COMPANY, PL'FF,
vs.
CHARLES C. CULP, DEF'T.

This cause is continued till the next term of this court.

And thereupon, afterwards, to wit, at the July term, of said court, A. D. 1871, among other proceedings had therein, the following was had, viz:

MONDAY, *July 24th*, A. D. 1871.

Court met pursuant to adjournment. Present said court.

THE KANSAS PACIFIC RAILWAY CO.
vs.
CHARLES C. CULP.

32 This cause came on to be heard on petition in error and transcript of the record of the district court of Saline County, and was submitted on briefs of counsel, Messrs. E. W. Dennis & McClure & Humphrey, for pl'ff in error, and J. G. Mohler, esq., for defendant in error, and taken under advisement by the court.

And be it further remembered that, thereafter, at the January term, A. D. 1872, of said court, to wit, on the 16th day of January, A. D. 1872, said cause came on for decision. And thereupon the following proceedings were had, as appears by the journal of said court of said day, to wit:

THE KANSAS PACIFIC RAILWAY COMPANY
vs. 644.
CHARLES C. CULP.

This cause came on for decision, whereupon Brewer J. delivered the opinion of the court, and it is ordered and adjudged, that the judgment of the court below be affirmed with costs, and hereof let execu-
33 tion issue all the justices concurring.

And thereupon, to wit, on the 16th day of January, A. D. 1872, the following syllabus and opinion of said court was delivered in said cause by said court per Brewer J., to wit:

STATE OF KANSAS, *Supreme Court, set:*

KANSAS PACIFIC RALWAY CO.
vs.
CHARLES C. CULP.

Affirmed.

Syllabus—By the court, Brewer, J.

1. The right to a patent is sufficient to subject lands to taxation.

2. Where land is granted upon conditions, with a provision for the issue of a patent, the performance of those conditions gives a right to a patent.

3. Where land is granted to a company for the sole purpose of
34 aiding in the construction of a railroad and telegraph line and such railroad and telegraph line are constructed to the approval of Government, the company acquires such an interest in the land as renders it subject to taxation even though it has not received a patent, and has not paid the cost of surveying, selecting, and conveying the same, and the fees of the register and receiver of the land-office required by law to be paid before the issue of the patent.

4. A grant of certain specified lands, excepting such as have been sold, reserved, or otherwise disposed of by the United States, passes the title to all not embraced within the exception.

5. A provision in a grant that all lands so granted which shall not be disposed of by the company within three years after the completion of the road, "shall be subject to settlement and pre-emption like other lands, at a price not exceeding one dollar and twenty five cents per acre, to be paid to said company," reserves no such interest to the Gov-
35 ernment as will render the land not subject to taxation.

All the justices concurring.

STATE OF KANSAS, *Supreme Court, set:*

KANSAS PACIFIC RAILWAY COMPANY
vs.
CHARLES C. CULP.

Opinion.

By the court, BREWER, J.:

Was the land in controversy subject to taxation for the year 1869? This is the only question presented by the record. The case was tried in the district court of Saline County, upon an agreed statement of facts. The plaintiff derived title solely under the act of Congress of July 1st, 1862, and amendment of July 2d, 1864, granting aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean. The agreed statement showed that plaintiff was the owner and in possession at the time of bringing the suit, and that the tax
36 proceedings were regular and conformed to the requirements of the statute. It further showed "that, at the time said land was assessed as aforesaid, the plaintiff company had completed the construction of the section of forty miles of their road within which the land lies to the approval of the President of the United States; that the said plaintiff at the time said land was assessed for taxation as aforesaid had not paid into the Treasury of the United States the cost of surveying, selecting, and conveying the said lands and that no patent therefor had been issued by the Government of the U. S. to the said plaintiff company; that said plaintiff had caused said lands to be valued and appraised, but that said land had not been selected and conveyed as provided in said act of Congress, nor the sum of one dollar per quarter section paid as provided; that said plaintiff had done all acts necessary to be done by it to obtain a patent for said land "except

as hereinbefore stated." This quotation from the agreed statement presents all the facts.

Was the land taxable?

37 It this land was the property of the railroad company, it was taxable: if of Government, not. Act of admission, sec. 3, clause 6, Gen'l Stat., p. 1019, sec. 1.

That no patent has been issued is immaterial. Lands may be taxable before patent issues. (Carroll vs. Safford, 3 How. U. S., 441; Witherspoon vs. Duncan, 4 Wal., 210; Stockdale vs. Treasurer of Webster County, 12 Iowa, 536.)

The patent is evidence of the legal title. Where the right to a patent exists, the Government holds the legal title only in trust, and the land is subject to taxation. Had the railroad company the right to a patent? If not, what had it to do first, and how did that affect its interest in the land? Sec. 3, of the act of July 1st, 1862, provides "that there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, every alternate section of public land designated by odd numbers to the amount of five (changed by the amendment of 1864 to ten) alternate section' per mile on each side of said railroad, on the line thereof, and within the limits

38 ten (changed by same amendment to twenty) miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of the road is definitely fixed; and all such lands so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company." And sect. 4, "that whenever said company shall have completed forty consecutive miles, the President of the United States shall appoint three commissioners to examine the same, and report to him in relation thereto; and if it shall appear to him that forty consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said

39 lands to said company, on each side of the road, as far as the same is completed, to the amount aforesaid, and patents shall in like manner issue, as each forty miles of said railroad and telegraph line are completed, upon certificate of said commissioners.

The agreed statement shows that all the prerequisites to the issue of a patent provided in this section have been performed, and if this were the only section bearing on the question, the right to a patent would be clear.

As against this right it is objected, first, that the company has not paid the one dollar per quarter section, required by the act of July 1st, 1864. This is a general act, applicable to all grants, except those for agricultural colleges, and requires the payment to the register and receiver of a fee of one dollar per quarter for each final location. We do not look upon this as attaching a new condition to the grant, a prerequisite to the vesting of title, but only as providing for payment for the evidence of such title. The title passes by grant, and the performance of the conditions named in the grant. To secure the evidence of such transfer of title a fee must be paid to the officers who do

40 the work, or a part of it, of preparing such evidence. It is like the fee paid to the conveyancer for drafting a deed, or to the

notary for taking the acknowledgment, or to the register for recording the deed, none of which are paid for the title, but only to obtain and perpetuate the evidence of such title. All that the Government receives for the land is the construction of the road. This done its interest in the land ceases. It is no longer its property. The legal title, it holds only in trust for the company, and that title it is ready to transfer upon payment of the expenses of making such transfer to the officers who do the work.

Again it is objected that the "cost of surveying, selecting, and conveying the land *land*, had not been paid into the Treasury of the United States. This requirement is found in the 21st sect. of the act of July 2d, 1864, which provides "that, before any land granted by this act shall be conveyed, there shall first be paid into the Treasury of the United States, the cost of surveying, selecting, and conveying the same by the said company or party in interest." Substantially the same remarks are applicable here as upon the last point. By the very language of the section, this payment is made not a condition of the grant, but of the conveyance. The land granted shall not be conveyed. The right of the company to the land secured by a performance of the conditions of the grant. The right to a conveyance only by the performance of certain additional requirements. The Government, after making the grant, in effect. says, now if you wish the lines run, and the boundaries of the land granted determined, you must pay the expenses. It demands nothing more for the land, but declines to pay the expenses of marking the boundaries and executing the conveyances.

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Again it is objected that the land had not been selected and conveyed, though it is admitted that the plaintiff had valued and appraised it. The term selection is not an appropriate one. That carries the idea that the company was authorized to choose from a large body of land a certain number of acres; that the land to be conveyed depended on the choice of the company, and that until such choice no one could ascertain which section would pass to the company and which remain with the Government. We do not so understand the act. The location of the line of the road determined what lands were included in the grant as plainly as though named by section, township, and range—every alternate section designated by odd numbers to the amount of ten alternate sections on each side of said railroad, and within the limits of twenty miles, except such as at the time of the location of said line of road the Government had sold or guaranteed to other parties. All that was to be done, embraced under the term selection, was to ascertain what lands within the limits described yet remained within the absolute control of the Government. The grant is equivalent to a conveyance by an individual of all the land in a certain tract which he had not previously sold. Would not the title pass instantly upon such conveyance? Is there any selection to be made prior to the vesting of title in the grantee? The grantee may not know until after examination of the records what portion of the tract he takes under his conveyance, but this examination and ascertainment do not help to pass the title. The cases are parallel.

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Again it is objected that "the title which the company is entitled to acquire, under the grant, is not an absolute and indefeasible estate. The acts of Congress containing this grant provide that all such lands remaining unsold or undisposed of by the said companies three years after the entire road is completed, to aid in the construction of which

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the grants were made, shall be subject to settlement and pre-emption like other public lands at $1.25 per acre—the money to be paid to said companies."

Counsel very elaborately and ingeniously discusses the difficulties which they suppose may arise in case the company should fail to sell within three years, between the future pre-emption and the holder of a tax-title. But what does the company's deed convey unless it has the title? How can it sell that which it does not own? We do not understand that upon a failure by the company to sell within the
44 three years, the lands revert to the Government, but simply that after such time the Government will have the right to sell it at the ordinary prices of Government land paying the proceeds over to the company. The Government receives nothing upon a sale made by it. It only acts as agent. The company is the principal and receives the money.

The opinions of the Commissioner of the General Land-Office and the Asssitant Attorney General of the United States presented as arguments in this case, are entirely inapplicable here, as they are based upon facts which, by the agreed statement, are excluded from our consideration.

The judgment of the court below will be affirmed.

All the justices concurring.

And thereupon, to-wit, on the 16th day of January, A. D. 1872, pursuant to the order and judgment of said court above set forth, the following mandate of said Supreme Court was issued to the said court below, to wit, the district court of the 8th judicial district sitting in
45 and for the county of Saline and State of Kansas, which said mandate is in words and figures as follows, to wit:

SUPREME COURT, *The State of Kansas:*

The district court within and for the eighth judicial district, Saline County, Kansas, greeting:

Whereas in a certain civil action lately pending before you, wherein the Kansas Pacific Railway Company was plaintiff, and Charles C. Culp was defendant, a judgment was rendered by you in favor of the said Charles C. Culp, on a transcript of which judgment and record said The Kansas Pacific Railway Company prosecuted a petition in error in the Supreme Court within and for the State of Kansas; and whereas, at the January term of said supreme court, A. D. 1872, on consideration of the said petition in error, it was ordered and adjudged by the said supreme court that the said judgment of the court below be affirmed, with costs:
46 You are therefore commanded that, without delay, you cause execution to be had of the said judgment of the supreme court, according to law, the said petition in error tothe contrary notwithstanding.

Witness my hand and the seal of said supreme court, affixed at my office in the City of Topeka, on the 16th day of January, A. D. 1872.

L. S.] A. HAMMATT, *Clerk.*

THE STATE OF KANSAS, *Supreme Court, set:*

I, Abram Hammatt, clerk of the supreme court of the State of Kansas, do hereby certify that the foregoing is a true, full, and correct transcript of the citation, bond, writ of error, petition in error, transcript of the record of the district court, (as exhibits thereto attached,) journal

entries, orders, and judgments, and all proceedings had in said supreme court or by authority thereof in said above-entitled cause as appears of record in my office.

As witness my hand and official seal hereto attached this 6th day of March, A. D. 1872.

[SEAL.]

A. HAMMATT,
Clerk Supreme Court State of Kansas.

(Indorsement on cover:) No. 389. The Kansas Pacific Railway Company, pl'ff in error, vs. Charles C. Culp. Kansas sup. court. Filed 27th May, 1872.

UNITED STATES OF AMERICA,

SUPREME COURT.

THE KANSAS PACIFIC RAILWAY CO.,
Plaintiff in ~~Appellant.~~ Error

vs.

CHARLES C. CULP,
~~Appellee.~~
Defendant in Error

Supplemental *BRIEF FOR PLAINTIFF IN E*

assignment of Error

The appellant in the above entitled cause brought its action in the District Court of Saline County, Kansas, against Charles C. Culp, to quiet the title of the plaintiff to the northeast quarter of section (31), township (17), range (4) west, in Kansas. To this action Culp defended and set up a tax title to the lands, which resulted in an agreed statement of facts, upon which the issue was submitted to the Court.

entries, orders, and judgments, and all proceedings had in said supreme court or by authority thereof in said above-entitled cause as appears of record in my office.

As witness my hand and official seal hereto attached this 6th day of March, A. D. 1872.

[SEAL.]

A. HAMMATT,
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(Indorsement on cover:) No. 389. The Kansas Pacific Railway Company, pl'ff in error, vs. Charles C. Culp. Kansas sup. court. Filed 27th May, 1872.

UNITED STATES OF AMERICA,

SUPREME COURT.

THE KANSAS PACIFIC RAILWAY CO.,
Plaintiff in ~~Appliant.~~ Error

vs.

CHARLES C. CULP,
~~Appellee.~~
Defendant in Error

Supplemental BRIEF FOR PLAINTIFF IN ERROR, containing

assignment of Errors.

The appellant in the above entitled cause brought its action in the District Court of Saline County, Kansas, against Charles C. Culp, to quiet the title of the plaintiff to the northeast quarter of section (31), township (17), range (4) west, in Kansas. To this action Culp defended and set up a tax title to the lands, which resulted in an agreed statement of facts, upon which the issue was submitted to the Court.

The agreed statement of facts are substantially as follows. Record

"The said plaintiff, by McClure and Humphreys, its attorneys, and the said defendant, by J. G. Mohler, his attorney, agree that it is the fact in this case that the said plaintiff was at the commencement of this suit the owner and in the possession of the land described in the plaintiff's petition; that the said land was assessed for taxation in and for the year 1869, and county, state and school taxes for that year were duly levied thereon; that the said taxes remaining unpaid, the said land was duly advertised and sold for taxes by the treasurer of Saline county, and for want of other bidders was by said county treasurer bid off at said sale for Saline county; that the tax certificate was afterwards by the county clerk of Saline county assigned for the taxes, costs and interest thereon to the defendant, on the 3d day of August, 1870; that the various proceedings in relation to the assessment aforesaid were regular. It is further agreed to be the fact that the plaintiff derived title solely under and by virtue of the act of Congress, approved July 2nd, 1864, entitled "An Act to amend an act entitled an act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean," &c., approved July 1st, 1862. That at the time said land was assessed as aforesaid the plaintiff company had completed the construction of the section of 40 miles of their road, within which the land in controversy lies, to the approval of the President of the United States. *That the said plaintiff at the time the said land was assessed for taxation as aforesaid, had not paid into the treasury of the United States the cost of surveying,*

selecting and conveying the said land; and that no patent therefor had been issued by the government of the United States to the said plaintiff company. That the said plaintiff had caused the said land to be valued and appraised, *but that the said land had not been selected and conveyed as provided in said act of congress, nor the sum of one dollar per quarter section paid as provided by law.* That said plaintiff has done all acts necessary to be done by it to obtain a patent for said land except as hereinbefore stated."

The said District Court upon the aforesaid agreed statement of facts found that the lands were subject to be taxed and assessed at the time they were so assessed, and rendered judgment for Culp.

Record page .

From this judgment a petition in error was filed in the Supreme Court of the State of Kansas, and the cause came on to be heard in the said court, and at the January term, 1872, of said court the judgment of the court below was in all things affirmed. Record

The following is a synopsis of the decision of said court:

1. The right to a patent is sufficient to subject lands to taxation.

2. Where land is granted upon conditions with a provision for the issue of patent, the performance of the conditions gives a right to a patent.

3. Where land is granted to a company for the sole purpose of aiding in the construction of a railroad and telegraph line, and the same are constructed to the ap-

proval of Government, the company acquires such an interest in the land as renders it subject to taxation, even though it has not received a patent and has not paid the cost of surveying, selecting and conveying the same, and the fees of the register and receiver of the land office, required by law to be paid before the issue of the patent.

4. A grant of certain specified lands, excepting such as have been sold, reserved, or otherwise disposed of by the United States, passes the title to all not embraced within the exceptions.

5. A provision in a grant "that all lands so granted which shall not be disposed of by the company within three years after the completion of the road shall be subject to settlement and preemption like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company," reserved no such interest in the Government as will render the land not subject to taxation.

Record, page

The judgment having been affirmed, the railroad company appeals from the judgment of the Supreme Court of Kansas to this Court, and assigns for error the following, namely:

1. The said Supreme Court of Kansas erred in deciding and affirming that the lands in controversy were subject to taxation.

2. The said Court erred in deciding that said lands were subject to taxation before the same had been selected and set apart to the railroad company, and be-

fore the costs of surveying, selecting and conveying the same had been paid, as required by law.

3. The said Supreme Court erred in deciding that the title to the lands in controversy had passed to the railroad company by virtue of the Acts of Congress of July 1, 1962, and July 2d, 1864, upon the completion acceptance of its railroad adjacent thereto, before the said lands were selected, and before the railroad company had paid the costs of surveying, selecting and conveying, as required by law.

4. The said Supreme Court erred in deciding that the lands in controversy if not sold in three years after the completion of said railroad shall be subject to preemption and settlement like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company, reserves no such interest to the Government as will render the land not subject to taxation by the State of Kansas.

5. The said Supreme Court by its decision and judgment made the Acts of Congress void. It denies the validity of the Acts of Congress of July 1, 1862, and of July 2, 1864, mentioned in the agreed statement of facts, the sections of which Acts nullified by said Court are set out in the subjoined brief and argument. And the said railroad company prays that the said judgment of the Supreme Court of the State of Kansas may be in all things reversed.

JOHN P. USHER,
For Appellant.